

STATE OF OKLAHOMA, *et al.*, )  
 )  
 *Plaintiffs,* )  
 )  
 v. ) **Case No. 4:05-cv-00329-GKF-SAJ**  
 )  
 TYSON FOODS, INC., *et al.*, )  
 )  
 *Defendants.* )

Defendants respectfully move the Court to compel Plaintiffs to produce working copies of the environmental models their experts have created in this case. Plaintiffs' experts possess operational computer programs that they designed and have utilized in preparing their expert reports. However, rather than simply producing those operational programs, Plaintiffs instead chose to dis-assemble the programs into the numerous separate files that relate to the programs and then produce those dis-aggregated files. As a result, the defense experts must attempt to re-assemble Plaintiffs' computer programs in the exact manner that they exist on the computers of Plaintiffs' experts before they can begin to fully and fairly analyze the models. This tactic has delayed the defense experts' work by almost a month.

As discussed in the attached declarations of Dr. Victor J. Bierman, Plaintiffs' experts have created complex computer programs that attempt to model complex environmental conditions in the Illinois River Watershed ("IRW"). As Dr. Bierman explains, "Plaintiffs' experts are employing models to support specific claims of historic and current contributions,

causation and injuries.” Ex. 1 ¶ 6. Those computer programs consist of a number of files that, when compiled and utilized in a certain manner, produce a specific set of results. Ex. 2 ¶¶ 6-7.

Plaintiffs’ experts appear to have created several models for this case. “Bernard Engel, for example, appears to have attempted to model the entire IRW and discusses the results of a model designed apparently to predict phosphorous loading into Lake Tenkiller.” Ex. 1 ¶ 11. “Dr. Scott Wells is also being offered as a modeling expert, and has apparently attempted to model Lake Tenkiller.” *Id.* ¶ 12.

Plaintiffs’ experts likely created these models by starting with “one of several ‘off-the-shelf’ computer programs available in the public domain such as HSPF, GLEAMS, EFDC, and CE-QUAL-W2.” *Id.* ¶ 7. Plaintiffs’ experts likely modified these selected models in an attempt to make them apply to the IRW. *Id.* This process involves building assumptions into the models about the characteristics of the site, “such as, for example, the equations that depict phosphorous moving from land to water.” *Id.*.

Once Plaintiffs’ experts modified their “generic” models to match their assumptions about the IRW, they likely attempted to assemble a “dataset to feed into the model in order to allow it to predict the desired output. A model of a system the size of the IRW requires a huge amount of data to even attempt to characterize each of the relevant environmental processes.” *Id.* ¶ 8. Additionally, Plaintiffs’ experts may have attempted to calibrate and test their models, producing files and datasets in the process. *Id.*

As a result of this work, Plaintiffs’ experts created several unique computer models. Plaintiffs’ experts have informed this Court that these revised computer programs they created are incredibly large and complex. As Dr. Bierman states:

Plaintiffs have informed the Court that Dr. Wells’ model takes 4 to 7 days to run for a 50-year simulation, and an additional 2 to 5

days to analyze the results from each simulation. *See* Plaintiffs' Emergency Motion for a Brief Extension, Dkt. # 1702, at 2-3; Wells Affidavit. It therefore requires an average of 9 days to complete a single cycle of Dr. Wells' model.

*Id.* ¶ 14.

It is Dr. Bierman's task to analyze Plaintiffs' multiple models and to assist the Court in understanding any errors or limitations in Plaintiffs' work. Plaintiffs' models will have myriad assumptions and calculations hidden within the model's computer code. Unpacking, analyzing, and critiquing these models is a detailed and time-consuming process. *Id.* ¶¶ 6-14. Dr. Bierman will first have to discern how the generic model template has been modified to apply to the IRW. This will include both identifying any IRW-specific assumptions built into the models, as well as checking the coding itself for errors. *Id.* Dr. Bierman will then have to review the datasets fed into the models, which again will reflect certain assumptions and which can dramatically affect the models' output. Finally, Dr. Bierman will have to review the datasets compiled to calibrate the models. *Id.*

To critique Plaintiffs' models, Dr. Bierman will have to re-run the models in an effort to re-create Plaintiffs' results. *Id.* If he is unable to do so, he will have to determine why. Importantly, for each error or inappropriate assumption Dr. Bierman identifies in a model, he will have to re-run the model to compare its results to Plaintiffs' results and to the appropriate calibrating data. *Id.* Plaintiffs' models will likely need to be re-run each time a questionable assumption is identified to demonstrate the effect of that assumption on the whole. *Id.* Thus, just the re-running of the models to demonstrate the effect of each assumption that is built into the model will be a months-long task. *Id.* ¶ 14.

But Dr. Bierman cannot even begin this work because Plaintiffs have withheld working copies of their models. Rather than producing working copies of these programs, Plaintiffs have

disassembled the operating programs and produced the component files that make up the programs. Dr. Bierman explains:

From the affidavits that Plaintiffs have filed with the Court, it is clear that Plaintiffs' experts have several working models of the Illinois River Watershed and Lake Tenkiller. By "working," I mean that these models operate on one or more computers and produce the results discussed in the Plaintiffs' various expert reports, not that the models are necessarily accurate representations of real-world events.

The models in this case are very complex. They contain numerous calculations and assumptions buried in the computer code.

Plaintiffs have produced a large number of individual computer programs, input files, output files and data files, but have not produced working copies of their models. Rather, Plaintiffs have disaggregated the working models on their computers and produced the component files. Plaintiffs have not indicated how these individual programs and files should be assembled to create working models that reproduce the exact results in their experts' reports.

I and my staff have put some of these pieces back together and have created operating versions of the experts' models, but there is more than one way to put these individual pieces together and it is impossible for us to determine how to put them together to reproduce the exact results in the experts' reports.

Ex. 2 ¶¶ 7-10.

The process of attempting to guess how Plaintiffs disassembled these files and to re-assemble the working programs has caused Defendants great delay and expense. *See id.*

Defendants are entitled to full disclosure of the bases and tools employed by Plaintiffs' experts to develop their opinions so as to allow Defendants' experts a full and fair opportunity to analyze and critique not only Plaintiffs' experts' conclusions, but their methodologies as well. To this end, Defendants' counsel have repeatedly asked Plaintiffs to produce the working copies of their models as they exist and are utilized on the computers of Plaintiffs' experts, but Plaintiffs have refused.

Plaintiffs' counsel have represented that it would technically difficult to produce working copies of Plaintiffs' models. However, the attached declaration from an experienced Information Technology professional makes clear that it is routine and relatively easy to make an exact duplicate of the hard drive (or drives) on which Plaintiffs' models reside. *See* Ex. 3. In other words, the models can be copied in their operational state as they exist on Plaintiffs' experts' computers. There is no need to disassemble the models into their multiple component files as Plaintiffs have done. *See id.* Plaintiffs' refusal to produce these models in their fully functional format fails to meet their obligations of expert disclosure under Fed. R. Civ. P. 26(a)(2) and creates a serious obstacle to Defendants' ability to prepare their defense.

For the foregoing reason, Defendants request that the Court order Plaintiffs to either produce working copies of their models, or allow Defendants' computer experts to make such copies. Defendants also respectfully request that the Court award the fees and costs associated with Dr. Bierman's attempt to re-assemble Plaintiffs' models, and the expenses created in bringing this motion.<sup>1</sup> Defendants address the time delays associated with this matter in a related motion to extend the deadline for Defendants' expert reports.

Respectfully submitted,

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<sup>1</sup> If the Court awards these costs, Defendants will work with Plaintiffs to agree upon the appropriate amount based on the time and expenses expended.

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